88-131

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1987

STATE OF WASHINGTON,

Petitioner,

v.

DONALD R. HOOPER,

Respondent.

PETITION FOR WRIT OF CERTIORORI
TO THE
COURT OF APPEALS OF WASHINGTON

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QUESTION PRESENTED

Does the rule of Edwards v. Arizona preclude initiating interrogation of a suspect who has requested counsel, after the suspect has been provided counsel, has consulted with counsel, and counsel has been advised of the proposed interrogation?

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OPINIONS BELOW

None of the decisions in this case have been reported. The oral decision of the trial court is in the appendix at pages 27 to 49. The written decision of the trial court is in the appendix at pages 50 to 69. The opinion of the Court of Appeals in the first appeal is in the appendix at pages 70 to 81. The opinion of the Court of Appeals in the second appeal is in the appendix at pages 82 to 89.

JURISDICTION

The decision of the Washington Court of Appeals was entered on March 28, 1988. The Supreme Court of Washington denied review on May 31, 1988.

This court has jurisdiction under 28 U.S.C. § 1257(3). The decision below is sufficiently "final" to justify review,

since later review of the federal issue will be unavailable, regardless of the outcome of a new trial. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1974).

CONSTITUTIONAL PROVISIONS INVOLVED

> No person ... shall be compelled in any criminal case to be a witness against himself. . .

U.S. Const., amend. 5.

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

U.S. Const., amend. 6.

STATEMENT OF THE CASE

This case arises out of a rape committed in Snohomish County, Washington, on November 11, 1982. Initial investigation of this rape was unproductive. On December 3, a police detective hypnotized the rape victim for the purpose of helping her remember the license number

of the rapist's car. The hypnotic session did not elicit any significant information.

On December 21, 1982, the respondent, Donald R. Hooper, was arrested in Kitsap County, Washington, for a separate rape and attempted murder committed there. Counsel was appointed to represent him on these charges shortly after his arrest. On the advice of counsel, Hooper sent written notice to both Kitsap and Snohomish County law enforcement authorities that he did not wish to be interviewed without an attorney being present.

The detective investigating the Snohomish County rape noticed similarities between that crime and the Kitsap County rape. Accordingly, he arranged for the Snohomish County victim to view Hooper in a line-up held on December 27, 1982. She

identified him as her rapist. Following the line-up, the detective asked Hooper's attorney if he could speak with Hooper. The attorney said that Hooper's desire was to have no contact with the detective.

Hooper ultimately pled guilty to the Kitsap County charges. In accordance with standard practice, the case was assigned to a probation officer, James Kathan, for a pre-sentence investigation. This investigation normally includes an interview with the defendant. Hooper's attorney was present when the investigation was ordered. He knew that the investigation might cover any information that was relevant to sentencing. The attorney nevertheless made no effort to prevent the interview from taking place.

Kathan initially interviewed Hooper about the Kitsap County charges. Hooper freely discussed the crime and told Kathan that "he felt a lot better" after having done so. Kathan then learned that Hooper was also suspected in the Snohomish County rape. He therefore arranged to meet with Hooper again in jail to discuss those charges.

At this meeting, Kathan first readvised Hooper of his rights to remain silent and to have counsel present during questioning. He then told him that he wanted to talk about a case in Snohomish County. Hooper responded that he had been advised by his attorney not to talk about that. Kathan said that Hooper should do what he thought was right and needn't feel compelled to talk. Hooper

replied, "But I want to talk with you." He proceeded to confess to the rape.[1]

After this interview, Hooper was charged in Snohomish County Superior Court with first degree rape. A pre-trial hearing was held to determine the admissibility of the confession. Defense counsel argued that the interrogation violated this court's holding in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981). At this hearing, as well as every subsequent stage of the proceedings, the State argued that Edwards does not preclude interrogation after counsel has been made available to the defendant. (A detailed summary of the manner in which this issue has been

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[1] The defendant also later confessed to the Snohomish County detective. The State has not challenged the Superior Court's ruling suppressing this second confession.

raised is in the appendix at pages 19 to 26.)

The Superior Court ruled that the interrogation violated Edwards. The court also ruled that the interrogation constituted a failure to honor Hooper's request for counsel. Finally, the court ruled that the statements were involuntary. This last ruling was based on Kathan's "implied and perhaps direct blandishment that the defendant would find peace of mind by making full disclosure." The Superior Court's oral ruling is in the appendix at pages 27 to 49. Its written findings of fact and conclusions of law are in the appendix at pages 50 to 69.

The Superior Court later dismissed the case, based on a failure to use proper safeguards when hypnotizing the

rape victim. The State appealed from the order of dismissal. On the appeal, the State also challenged the suppression of the confession. The Washington Court of Appeals held that dismissal was not the proper remedy for any improprieties in the hypnotic procedure. It also reversed the trial court's finding that the statement was involuntary, since that finding was unsupported by other findings of fact or by the testimony. Nevertheless, the Court of Appeals affirmed the suppression of the confession. The court held that the interrogation violated the Edwards

doctrine and failed to respect Hooper's request for counsel.[2]

The State petitioned for review of this decision by the Washington Supreme Court. This petition was denied. Hooper sought certiorari in this court to review the voluntariness of the confession. This petition as well was denied. Hooper v. Washington, U.S. Sup. Ct. no. 84-7006.

On remand, a different Superior Court judge held that the victim's identification of Hooper was admissible, since it was not affected by the hypnosis. A jury found Hooper guilty. He appealed from the conviction. On the appeal, the

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[2] The Court of Appeals specifically cited State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982). That case simply applied this court's ruling in Edwards. As Robtoy notes, the Washington Supreme Court had previously rejected a per se rule against interrogating a suspect who had requested counsel. State v. Pierce, 94 Wn.2d 345, 618 P.2d 62 (1980).

State asked the court to re-consider the admissibility of Hooper's confession in the event of a reversal. The Court of Appeals stayed consideration pending resolution in the Washington Supreme Court of another case dealing with the hypnosis issue.

That court ultimately held that a witness could not testify to any fact learned after hypnosis. State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1988). The Court of Appeals called for supplemental briefing on the impact of Coe. The State conceded that reversal of of Hooper's conviction was required but again sought re-consideration of the admissibility of the confession.

The Court of Appeals reversed Hooper's conviction and remanded the case for a new trial. The court noted its

power to reconsider the suppression of the confession, but it declined to do so. The court relied on a recent case in which it had held that a suspect could not be interrogated, even after he had consulted with counsel by telephone. State v. Johnson, 48 Wn. App. 681, 739 P.2d 1209 (1987). A copy of the Court of Appeals' decision in the present case is in the appendix at pages 82 to 87. A copy of its decision in Johnson is in the appendix at pages 90 to 106. The State again sought review in the Washington Supreme Court, which was again denied.

ARGUMENT

This case presents an important question concerning the interpretation of this court's holding in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1602 (1981) Edwards holds:

> [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication ... with the police.

Id. at 484-85.

Despite the seeming clarity of this holding, courts have reached disparate results about its meaning. On the one hand, several courts have applied Edwards in accordance with its strict language. They have permitted police to initiate interrogation of suspects after the suspects have consulted with counsel. These courts have permitted the suspect to waive counsel under these circumstances, provided that the waiver is knowing and intelligent. United States v. Bentley, 726 F.2d 1124 (6th Cir. 1984); Commonwealth v. Gale, 315 Pa. Super. 59, 461 A.2d 634 (1983); Bunch v.

Commonwealth, 225 Va. 423, 304 S.E.2d 271, 275-77, cert. denied, 464 U.S. 977, 78 L.Ed.2d 352, 104 S.Ct. 414 (1983).

At the same time, several other courts have given Edwards a much more expansive interpretation. They have held that a suspect who has demanded counsel cannot be interrogated without counsel, unless the suspect initiates the communication. State v. Johnson, 48 Wn. App. 681, 685, 739 P.2d 1209, 1211 (1987); Phifer v. State, 651 S.W.2d 774, 778 (Tex. Cr. App. 1983); State v. Beaupre, 123 N.H. 155, 459 A.2d 233 (1983). In effect, these courts have converted the requirement that counsel be made available into a requirement that counsel be present.

This broad interpretation of Edwards has far-reaching effects. This court has

applied Edwards to interrogation about any crime, not just the crime for which the suspect was arrested. Arizona v. Roberson, 56 U.S.L.W. 4590 (U.S. 6/15/88). Consequently, under the broad interpretation of Edwards, a prisoner who has requested counsel can never be interrogated about any crime so long as he remains in custody. In effect, virtually all interrogation of a convicted inmate is barred forever. Furthermore, a suspect cannot agree to a police request that he submit to interrogation in the absence of counsel, even if both the suspect and his attorney agree that this is in his best interests.

This decision of the Washington Court of Appeals reflects a conflict among the courts as to the proper scope of Edwards. This disagreement greatly

affects the time within which the Edwards restrictions apply. Under the one interpretation, they last only a short time, until the suspect is provided counsel. Under the other interpretation, the restrictions may last forever. Which of these interpretations is correct presents an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted this 13th day of July, 1988.

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APPENDIX

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

1. Prior to the hearing on the defendant's motion to suppress his statements, the State filed a memorandum which argued as follows:

> The major argument presented by the defendant in support of his motion to suppress the statements given is that they were obtained in violation of his Fifth Amendment right to have counsel present during the interrogation. The heart of that argument is based on the 1981 United States Supreme Court decision of Edwards vs. Arizona, [451 U.S. 477, 68 L.Ed.2d 318, 101 S.Ct. 1880 (1981)]. Edwards is clearly controlling in the instant case. More clearly, this state's Supreme Court has adopted the rule of Edwards in State v. Ro[b]toy, [98 Wn.2d 30, 37, 653 P.2d 284, 289 (1982)]. Counsel for the defendant correctly quotes the holding of Edwards in his suppression brief at pages 8 and 9, but overlooks the most operative fact in that holding. The fact is that the defendant "... is not subject to further interrogation by the authorities until counsel has been made available to him ..." Because counsel had been made available to Mr. Hooper after his initial

> request for counsel in December, ... the prohibition of Edwards is not applicable to the case at bar.

State's Memorandum in Opposition to Defendant's Motion to Suppress at 10-11.

2. At the hearing on the defendant's motion to suppress his statement, the prosecutor argued as follows:

> Now, Mr. Muenster [defense counsel] has made several statements in his briefs to the court which can best be summarized by saying that it appears to be the defense position that a defendant, once having requested counsel, cannot waive his right to counsel. In fact, at page 11 of the defendant's first Memorandum in Support of the Motion to Suppress Statements, Mr. Muenster says:
>
> > Edwards and Robtoy make it clear that Mr. Hooper simply was not permitted to waive his right to counsel until he had an opportunity to consult with him in this new situation.
>
> Edwards does not say that. Robtoy does not say that. There is no case that says that. It is a novel approach to the law to say -- in effect, the basis of the defense is that in December, when Mr. Hooper's

> counsel, not even Mr. Hooper, invokes the Sixth Amendment right to counsel and says to Detective Fagan, "My client will not talk to you," that no matter how many times Mr. Hooper has the presence of counsel, has the opportunity to talk with counsel and discuss with counsel, no matter what change of circumstances there are, that law enforcement officials from any jurisdiction on any totally unrelated case is forever barred from even asking Mr. Hooper if he wants to make a statement. That is not the law and it is certainly not what Edwards says.

Verbatim Report of Proceedings (7/8/83) at 77-78.

3. In its brief on the initial appeal, the State raised the following issue:

> Where a defendant has claimed his right to counsel, with respect to a crime, been convicted of another crime, and scheduled for a pre-sentence interview which is known to his attorney, is the pre-sentence interviewer precluded from questioning him about the original, uncharged crime?

Brief of Appellant (Washington Court of Appeals no. 13714-0-I) at 4-5. In sup-

port of this issue, the State argued as follows:

> Edwards does not hold that a suspect who demands counsel can only be interrogated in the presence of counsel. It only holds that he can not be questioned until counsel is made available to him. [Edwards, 451 U.S. at 484-85]; see Commonwealth v. Gale, 461 A.2nd 634 (Pa. Super. 1983). In the present case, the defendant had ample opportunity to consult with counsel before his interview with Mr. Kathan. Indeed, the defendant's attorney was fully aware that the defendant would undergo a pre-sentence interview, but he made no effort to be present. [Verbatim Report of Proceedings (7/8/83)] at 62-64. Edwards can not be interpreted as holding that an interview conducted with the knowledge and tacit approval of the defendant's counsel somehow violates his right to counsel.

Brief of Appellant (Washington Court of Appeals no. 13714-0-I) at 15.

4. In its petition for review of the Court of Appeals' decision on the initial appeal, the State raised the following issue:

> A presentence investigator, after advising the defendant of his constitutional rights, questioned him concerning another crime of which he was suspected. The defendant's attorney was aware of the interview but chose not to be present. Did this questioning violate the defendant's right to counsel?

State's Petition for Review (Washington Supreme Court no. 51437-2) at 1. In support of this issue, the State again argued that Edwards only precludes interrogating a defendant until counsel is provided to him. Petition for Review at 6.

5. At a pre-trial hearing in the Superior Court, the prosecutor made the following statement:

> I would note for the record, also, Your Honor, that the State would like to preserve the issue of the admissibility of the confession to Mr. Kathan. Recognizing that this case may at some later point again be before the appellate court, we wish to preserve the issue of admissibility of that confession so that it could be re-argued on appeal. I

> would make a formal motion at this time for the Court to consider admissibility of that before the jury.

Verbatim Report of Proceedings (12/2/85) at 23.

6. In its brief on the second appeal, the State raised the following issue:

> With the knowledge of defense counsel, a pre-sentence investigator initiated an interview with the defendant. Did this interview violate the defendant's right to counsel?

Brief of Respondent (Washington Court of Appeals no. 17764-8-I) at 4. In support of this issue, the State again argued that Edwards "does not apply to police conduct occurring after counsel has been made available to the defendant." Id. at 25.

7. In its supplemental brief in the Court of Appeals, the State once more asked the court to reconsider the suppres-

sion of the defendant's confession. The State cited a decision from the Sixth Circuit Court of Appeals, holding that Edwards did not bar re-interrogation under circumstances similar to those of the present case. United States v. Bentley, 726 F.2d 1124 (6th Cir. 1984). Supplemental Brief of Respondent (Washington Court of Appeals no. 17764-8-I) at 2-3.

8. In its petition for review of the Court of Appeals' decision on the second appeal, the State raised the following issue:

> After a defendant has asserted his right to counsel, can a pre-sentence interviewer, acting with the knowledge of defense counsel, initiate an interview with the defendant?

Petition for Review (Washington Supreme Court no. 55061-1) at 1. In support of this issue, the State pointed out that

the Sixth Circuit Court of Appeals in Bentley "has declined to apply Edwards under facts similar to those of the present case." The State also noted that the divided opinion of the Washington Court of Appeals in Johnson illustrated "the confusion over the proper scope of Edwards." Petition for Review at 9-10.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Plaintiff,	)	CAUSE NO. 83-1-00146-8
vs.	)	
DONALD R. HOOPER,	)	
Defendant.	)	

ORAL DECISION

July 12, 1983

I think before I proceed further, a couple of preliminary comments are in order. I sometimes have grave doubts, myself, as to the vitality of the exclusionary rule due, in part, to the often harsh results that may flow from otherwise relatively innocuous police conduct or, perhaps, misconduct. I am also aware of some current interest in articulating a good faith exception to this rule. However, I do believe that judges, perhaps

even more than jurors or police officers, must accept and apply the law as it exists and not as they may wish it existed.

In discussing the exclusionary rule, perhaps in a somewhat different context, our Supreme Court indicates that State v. Bonds, [98 Wn.2d 1, 12, 653 P.2d 1024, 1031 (1982)], said as follows:

> "In sum, therefore, the exclusionary rule should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means."

I believe in the Bonds case, those comments were made in the context of a challenge to a search, and, thus, it may well be within the context of this particular case that the individual's right to privacy is not of paramount concern, but,

obviously, the other two objectives referred to in that case are applicable here. In determining whether a defendant's right to effective assistance of counsel has been impinged upon or whether there has been a waiver of the defendant's right to remain silent depends, in each case, upon the particular facts and circumstances surrounding the case.

The facts in this case would demonstrate that prior to December 21, 1982, the defendant was arrested and in custody in Kitsap County on charges of first degree rape and attempted murder in the first degree. On that date, the defendant was advised by a judge of his rights, as illustrated by Exhibit No. 1, and at that time he was represented by his appointed counsel, Mark Yelish. On December 27, 1982, a lineup was held in Kitsap County at the request and under

the supervision of Detective Fagan of the Snohomish County Sheriff's Office. At that time the defendant was identified by a Snohomish County rape victim. At the conclusion of the lineup, Detective Fagan asked for an opportunity to interview the defendant concerning the Snohomish County case and was advised by Mr. Yelish that the defendant would not submit to such as interview. Sometime thereafter, I believe, the defendant pled guilty to the Kitsap County charges and faced a sentence of 20 years to life on each count.

The Court ordered a presentence investigation and the case was assigned for investigation to James Kathan, of the Department of Probation and Parole. Mr. Kathan met with the defendant on three occasions. During the first or second meeting, Mr. Kathan informed the defendant of the importance to him of his cooperation and honesty in the preparation

of the PSI; that a sentencing recommendation would be made based on the investigation; that the sentencing judge would review the PSI and recommendation before fixing and imposing the sentence, and that it was important that the defendant disclose any information relating to criminal activity so such information could be given to the sentencing judge. In this respect, Mr. Kathan was an agent of the court, acting under authority of the court and pursuant to a court order.

I specifically make no finding as to what use may be made of incriminating statements made by a defendant to a presentence investigator in a typical case. As the facts will shortly demonstrate, this was not a typical case.

During the initial two interviews, the defendant freely discussed the Kitsap County case and stated that admitting to

these offenses cleared his mind or gave him some mental satisfaction or psychological relief. Prior to the third interview with the defendant, Kathan was informed by Kitsap County Prosecutor Danny Clem that the defendant was a suspect in a Snohomish County rape incident and that items found in the defendant's car connected him to the crime. Mr. Kathan and Mr. Clem both knew that the defendant was represented by Yelish, and I can only infer that Clem knew of Mr. Yelish's earlier refusal to allow Fagan to interview the defendant with respect to the Snohomish County case. Mr. Kathan determined to question the defendant regarding this case, and he candidly admits that it was his intention to give any information he received to Clem and to the police, themselves. In what can only be regarded as an obvious effort to insure that any

such information would be possibly or probably admissible in a later proceeding, I am convinced that Clem gave Kathan a copy of Exhibit 1 and I am persuaded that he impressed upon Kathan the importance of reading those rights to the defendant and obtaining a waiver of the rights set forth therein. Thus, Mr. Kathan, at the very least, was now serving two roles; that is, he was an investigator for the court and an investigator for the prosecution, and that is the best I can make of the evidence. I think there could be a strong suggestion that at this point in time he was performing exclusively the latter role I have just identified. If Mr. Clem did not inform Kathan of the defendant's earlier refusal to speak with Fagan, in any event, Kathan acknowledges that the defendant so advised him that he had been questioned

by Snohomish County Police and had refused to respond to their questions.

It should be noted at this time that the defendant didn't instigate or request the third interview with Kathan, which occurred on February 14, 1983. Kathan showed the defendant the copy of Exhibit 1, and he states that the defendant asked no questions concerning his rights. Mr. Kathan has not given a narrative of his conversation with the defendant, but he has responded to questions put to him by counsel at this proceeding and I, therefore, can only attempt to put his description of that conversation in a logical sequence.

Kathan advised the defendant that he wanted to discuss the Snohomish County case. The defendant responded that his attorney had advised him not to talk about the case. Perhaps at this point

the defendant also indicated that he, personally, was willing to or desirous of discussing it. Assuming, for the sake of argument, that that was the context of the defendant's statement made at that point in time and assuming that this was somehow ambiguous, Kathan may have been permitted, under case authority, to attempt to clear up the ambiguity. He did not do so, however. He responded in general terms: "If that's what you attorney has advised you, you needn't feel compelled to talk about the case," but in this same context, he acknowledges that he stated to the defendant, in effect, that: "If you feel a need to clear your mind of this case, as you did with the Kitsap County case, you should do so." As earlier indicated, in this conversation, the defendant informed Mr.

Kathan that he had earlier refused to talk to the Snohomish County police officers.

I think, in context, we should keep in mind that defendant's perception of Mr. Kathan's role; their earlier discussions regarding the importance of honesty and cooperation; the new, but undisclosed role and intent of Mr. Kathan as the result of his conversations with Mr. Clem, and the implied, if not direct, blandishment that the defendant would find some peace of mind by making full disclosure. As indicated earlier, Mr. Kathan has made no secret of the fact that he intended to question the defendant regarding the Snohomish County occurrence. It is the statement of Mr. Kathan, however, that such questioning was not necessary, that the defendant said he wanted to talk, and proceeded to

give incriminatory statements regarding the Snohomish County case which were not in response to questions by Mr. Kathan, although, as I indicated, he made no secret of the fact that it was his intent to question Mr. Hooper concerning the same. Mr Kathan candidly admits that during these discussions the defendant became emotional and tearful, as he had earlier in describing the incidents in Kitsap County. The defendant's attorney, Mr. Yelish, appeared shortly thereafter and stated that there would be no more questioning concerning the Snohomish County case, and the interview ended.

Kathan, consistent with his objective and his declared intent, returned directly to the office of the Kitsap County Prosecutor and, shortly thereafter, spoke to the Kitsap County Chief of Detectives, Morgan. He related to

them what the defendant had said and, also, at least, told Morgan that the defendant's attorney had stated, "No more questions with respect to the Snohomish County case." Armed with this information, Morgan called Fagan in Snohomish County, advised him of the information supplied to Kathan, and stated to Mr. Fagan that this might be a good time to interview the defendant, notwithstanding the information that Kathan had given to Morgan.

On February 16, 1983, Mr. Fagan went to Kitsap County and arranged to have the defendant brought to an office in the Kitsap County Jail. Fortuitously, this occurred at 12:27 p.m. Mr. Fagan read the defendant his rights from Exhibit No. 3 and advised the defendant that he was investigating the Snohomish County case.

The defendant stated that he would discuss other issues, but not the Snohomish County case without his lawyer present. Mr. Fagan than called the office of Mark Yelish at 12:45, in the presence of the defendant; advised a secretary there at that office where he was and what he was doing. She responded that Mr. Yelish was out to lunch and would return within 10 to 15 minutes and would then come to the Kitsap County Jail. Yelish did not return to his office until approximately 1:30, whereupon he came to the jail.

Mr. Fagan states that after making the call to Mr. Yelish's office, he than offered to return the defendant to his cell or allow him to remain in the office, awaiting the arrival of Yelish. According to Mr. Fagan, the defendant responded he'd like to wait in that office. Mr. Fagan concedes, however,

that his offer does not appear in his initial report. He further concedes that he hoped the defendant would not return to his cell and that he hoped the defendant would make incriminating statements while awaiting the arrival of his attorney. According to Mr. Fagan, the defendant, without urging or questions, embarked upon an approximate 8-minute dialogue without interruption about a book he'd read and how it related to his problems. Then he started to cry and said: "I'll tell you what you want to know and satisfy your curiosity. I don't care if my attorney is here or not," after which he made certain admissions concerning the Snohomish County incident.

It should be noted, perhaps, that as of February 16, 1983, Mr. Fagan's best recollection is that his report on the Snohomish County case had been referred

to the Snohomish County Prosecutor, although no Information was then filed. Also, while there is no showing that it was ever received or seen by Fagan, I am persuaded that Exhibit No. 2 was in fact mailed to the Snohomish County Sheriff's Office by the office of Mr. Yelish on or about January 7, 1983. While the significance of this document may have been lost on other persons in the sheriff's office, it does reinforce the admonition given to Mr. Fagan by Mr. Yelish on December 27, 1982.

I would point out that I have frequently seen like documents filed by defense counsel in Snohomish County. I have never been called upon to rule as to the effect of such documents and, quite frankly, I think the reason I have not is because, typically speaking, they are given to the prosecutor's office and I

believe they are honored by the Snohomish County Prosecutor and, thus, there has been little occasion to determine what effect they have in the event they are dishonored.

The recent case of State v. Robtoy, [98 Wn.2d 30, 653 P.2d 284 (1982)], I think, does modify what may have been the law prior to its promulgation. That case holds that:

> ". . . an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

[Id. at 37, 653 P.2d at 389 (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981))].

It is undisputed that Mr. Hooper initiated no conversations with the police subsequent to December 27, 1982, with respect to the Snohomish County incident.

I am referred to the recent case of State v. Kaiser, [34 Wn. App. 559, 663 P.2d 839 (1983)]. However, it is important to note in that case that Mr. Kaiser was meeting with the police detective to informally discuss certain accusations against him. He indicated he wished to speak to an attorney; questioning stopped; he was given an opportunity to speak with an attorney. He then returned to the detectives and decided to make a statement. In other words, in that case, there was a clear demarcation in the proceedings from the time the right to counsel was asserted and the time that the defendant, by returning to the detectives, reinitiated discussion.

The Robtoy case, in a footnote, discussed the prior holding in the case of State v. Pierce, [94 Wn.2d 345, 618 P.2d 62 (1980)] and states as follows:

> "Although the four factors we identified in State v. Pierce . . . as bearing on the determination of whether an accused waived the right to counsel after previously asserting the right are no longer valid . . . those factors have continuing validity in determining subsequent waivers in two other situations. First, those factors are relevant to the question of the validity of a subsequent waiver of the right to remain silent . . . Second, those factors are relevant to the validity of a waiver of the right to counsel if . . . the accused himself initiates further communication, exchanges, or conversations with the police."

[Robtoy, 98 Wn.2d at 37 n. 1, 653 P.2d at 289.]

The factors outlined in Pierce are as follows:

> ". . . the police may question a suspect who has once cut off questioning by requesting an attorney as long as (1) the right to cut off questioning was scrupulously honored,"

[94 Wn.2d at 352, 618 P.2d at 66.]

And I emphasize 'scrupulously.' That is a word that has appeared in many cases on this subject and I assume it means something.

> "(2) the police engaged in no further words or actions amounting to interrogation before obtaining a valid waiver or assuring the presence of an attorney, (3) the police engaged in no tactics which tended to coerce the suspect to change his mind, and (4) the subsequent waiver was knowing and voluntary."

[Id.] The fact in this case that no Information was filed as of February 16, 1983, and that Mr. Yelish may, in some parties' view, have been appointed as counsel by the Kitsap County Court only is of little significance and is not determinative of this issue.

Mr. Fagan is an 8-year veteran of the Snohomish County Sheriff's Office and I am confident of his skill as an experienced interrogator. Police interrogation is not defined solely by the matter of whether question marks are or are not inserted into the conversation. Interrogation is, itself, a process designed to

elicit information from another and it can take many forms, and it is this circumstance, I believe, that has caused our courts to state that a request for counsel might be "scrupulously honored," and I emphasize, once again, "scrupulously." The attorney-client relationship is a significant and important one under our law and frankly, it adds no luster to the role of the State in a criminal investigation to interject itself into that relationship and, by word or conduct, to persuade or even suggest that the client need not follow or should otherwise disregard that advice of counsel that the court has undertaken to insure will be provided.

I am persuaded that under all the facts and circumstances of this case, the defendant's constitutional rights were not honored by the State. Defendant had

counsel who made every effort to insure the defendant's rights would be preserved. The State, through its conduct, both Mr. Kathan and Deputy Sheriff Fagan, went to substantial lengths to insure that the defendant would not receive the benefit of and the effective assistance of counsel and, by their acts and conduct, they did not scrupulously honor his request for counsel. That fact that he subsequently made statements to both those individuals does not equate with a knowing and intelligent waiver of his right to remain silent and I am satisfied, based on the totality of the circumstances as they exist in this case, that both of the statements made to Mr. Kathan and to Officer Fagan must be suppressed. I would further point out that even if there were some justification for considering the admissibility of the statements

made to Fagan, I think they are so tainted by the inappropriateness of the conduct of Mr. Kathan as to independently warrant their suppression.

I do not want this case to be cited as authority for some limitation on the duty of authority of a presentence investigator to do a thorough job in his investigation or as establishing some element of confidentiality between the presentence investigator and the convicted defendant he is interviewing. The unique circumstances of this case will serve to limit its scope and application. I think Mr. Kathan, in this particular case, went too far ali[g]ning himself with the prosecutorial arm of the State.

The statements will be suppressed.

[In response to a request by the Deputy Prosecuting Attorney to "address the issue of voluntariness," the court made the following additional remarks:]

I don't know whether it's going to be helpful to counsel or not because this issue has not really been specifically addressed, or at least considered by me. I may have just overlooked it in the Briefs.

I am finding in this case that the conduct of Mr. Kathan, as limited to this case, constituted an overreaching and that, in sum, it was coercive; that, under the circumstances of this case, the responses of the defendant were not freely and voluntarily given and did not constitute a waiver of his rights to counsel.

. . .

The consequent statements to Fagan were taken with the same fatality.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 83-1-00146-8
	)	
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF
DONALD R. HOOPER,	)	LAW, AND ORDER ON
	)	CrR 3.5 HEARING
Defendant.	)	

THIS CAUSE came on regularly for hearing on July 8 and 12th, 1983, before the undersigned judge of the above-entitled Court. The plaintiff State of Washington was represented by deputy prosecutor Michael Magee. The defendant, Donald R. Hooper, was present and represented by his attorney, John R. Muenster. The defense moved to exclude custodial statements allegedly made by the defendant. The Court heard and observed the testimony of witnesses and the argument of counsel, and reviewed the affidavit and memoranda submitted by the parties.

Being fully advised, the Court enters the following findings of fact, conclusions of law and order.

A. Undisputed facts.

1. On or about December 21, 1982, the defendant was arrested, not on these charges, and asked for an attorney. He was placed in custody in Kitsap County on charges of first degree rape and attempted murder in the first degree. On that date, the defendant was advised by a judge of his rights, as illustrated by exhibit #1, and at that time he was represented by his appointed counsel, Mark Yelish.

2. On December 27, 1982, a lineup was held in Kitsap County at the request of and under the supervision of detective

Fagan of the Snohomish County Sheriff's Office. At the lineup the defendant was identified by a Snohomish County rape victim. At the conclusion of the lineup, detective Fagan asked for an opportunity to interview the defendant concerning this Snohomish County case and was advised by attorney Yelish that the defendant would not submit to such an interview.

3. On December 21, 1982, the defendant executed a document entitled "Notice", a copy of which was admitted in this Court as exhibit 2. The "Notice" was signed by the defendant and stated in parts:

> . . . that he [the defendant] is represented by the law offices of McGilliard, Crawford and Yelish; that he desires not to be interrogated and/or questioned by any member of the prosecuting attorney's office or law enforcement agencies without the physical presence of his attorney and that he desires to exercise his right to remain silent.

Fagan of the Snohomish County Sheriff's Office. At the lineup the defendant was identified by a Snohomish County rape victim. At the conclusion of the lineup, detective Fagan asked for an opportunity to interview the defendant concerning this Snohomish County case and was advised by attorney Yelish that the defendant would not submit to such an interview.

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investigation; that the sentencing judge would review the PSI and recommendation before fixing and imposing the sentence; and that it was important that the defendant disclose any information relating to criminal activity so such information could be given to the sentencing judge. In this respect, Kathan was an agent of the court acting under authority of the court and pursuant to a court order; he presented himself to the defendant as such.

6. During the initial two interviews with Kathan, the defendant freely discussed the Kitsap County case. In doing so, he became emotional and tearful.

7. At some point subsequent to the second interview with the defendant, Kathan was informed by Kitsap County

Prosecutor Dan Clem that the defendant was a suspect in a Snohomish County rape incident and that items found in the defendant's car connected him to the crime.

8. Mr. Kathan and Mr. Clem both knew that the defendant was represented by attorney Yelish. Clem knew of Mr. Yelish's earlier refusal to allow detective Fagan to interview the defendant with respect to this Snohomish County case. [This last sentence was marked by the Judge: "Disputed but found by the court to be the case."]

9. Mr. Kathan determined to question the defendant regarding this case. It was his intention to give any information he received to Clem and to the police themselves.

10. In an effort to help insure that any information Kathan obtained from the

defendant would be admissible, Clem gave Kathan a copy of exhibit 1 and impressed upon Kathan the importance of reading the rights to the defendant and obtaining a waiver of the rights set forth therein. [Marked by Judge: "Disputed but found by the court to be the case."]

11. At the very least, Mr. Kathan was now serving two roles; he was an investigator for the court and an investigator for the prosecution. There is further a strong suggestion in the testimony in this case that he was performing exclusively the rule of investigator for the prosecution at this point in time.

12. Mr. Kathan interviewed the defendant at the jail for the third time on February 14, 1983. The defendant did not instigate or request this interview. Mr. Kathan showed the defendant a copy of

exhibit 1, and the defendant asked no questions concerning his rights.

13. Mr. Kathan advised the defendant that he wanted to discuss the Snohomish County case. Mr. Kathan did not advise the defendant of his new role as investigator for the prosecution.

14. The defendant responded that his attorney had advised him not to talk about the Snohomish County case. The defendant also advised Mr. Kathan that he had been questioned by Snohomish County police previously about the incident and had refused to respond to their questions. At some point the defendant also indicated that he, personally, was willing or desirous of discussing the incident.

15. Mr. Kathan responded in general terms: "If that's what your attorney has advised you, you needn't feel compelled

to talk about the case," but in this same context, he stated to the defendant, in effect, that: "If you feel a need to clear your mind of this case, as you did with the Kitsap County case, you should do so."

16. The defendant and Mr. Kathan then discussed the Snohomish County case and the defendant made incriminating statements regarding it. The statements were made in the context of the defendant's perception of Mr. Kathan's role as the presentence investigator for the court and in the context of their earlier discussions regarding the importance of honesty and cooperation. The defendant did not know of Mr. Kathan's new role as investigator for the prosecution, nor was he told of Mr. Kathan's intention to report any statements made to the prosecutor and to the police. In addition,

the statements were made in the context of Kathan's implied and perhaps direct blandishment that the defendant would find peace of mind by making full disclosure.

17. During the discussion of the Snohomish County incident the defendant became emotional and tearful, as he had earlier in describing the incidents in Kitsap County.

18. During the discussion, the defendant's attorney, Mr. Yelish, appeared at the interview room in the jail where Mr. Kathan and the defendant were seated and conferred with the defendant. Mr. Yelish then advised Mr. Kathan that there would be no more questioning concerning the Snohomish County case, and the interview ended.

19. Mr. Kathan, consistent with his intent, returned directly to the office

of the Kitsap County prosecutor and advised Mr. Clem of the incriminating statements the defendant had made regarding the Snohomish County incident. Shortly thereafter, Mr. Kathan spoke with the Kitsap County chief of detectives, Morgan. Morgan was also advised of the defendant's incriminating statements. Mr. Kathan told Mr. Morgan that the defendant's attorney had stated, "no more questions with respect to the Snohomish County case."

Armed with this information, Mr. Morgan called detective Fagan in Snohomish County, advised him of the information supplied by Kathan, and stated to Fagan that "this might be a good time" to interrogate the defendant, notwithstanding attorney Yelish's admonition to Mr. Kathan.

20. At no time had Mr. Kathan given attorney Yelish notice of his intent to interrogate the defendant regarding the Snohomish County incident.

21. On February 16, 1983, detective Fagan went to Kitsap County and arranged to have the defendant brought from his cell to an office in the Kitsap County Jail. This occurred at 12:27 p.m. Mr. Fagan read the defendant his rights from exhibit #3 and advised the defendant that he was investigating the Snohomish County case. The defendant stated that he would discuss other issues, but not the Snohomish County case without his lawyer present.

22. Detective Fagan then called the office of Mark Yelish at 12:45, in the presence of the defendant; he advised a secretary there at that office where he

was and what he was doing. She responded that Mr. Yelish was out to lunch and would return within 10 to 15 minutes and then would come to the Kitsap County Jail.

23. Detective Fagan is an eight year veteran of the Snohomish County Sheriff's Office and is a skilled, experienced interrogator.

24. Fagan wanted the defendant to continue the interview. He hoped that the defendant would make incriminating statements while awaiting the arrival of his attorney.

25. The defendant stayed in the office with detective Fagan after the phone call to Yelish's office.

26. During the session with Fagan, and prior to the arrival of his attorney, the defendant started to cry and made

certain admissions regarding the Snohomish County incident charged in this case.

27. The defendant's attorney, Mr. Yelish, did not return to his office until 1:30 p.m. He then received the message about Fagan's visit and immediately went to the Kitsap County Jail. The defendant was still with Fagan. Mr. Yelish conferred with the defendant, and then advised detective Fagan that the defendant would make no statements regarding the Snohomish County incident.

28. Detective Fagan knew that Mr. Yelish was representing the defendant. He did not notify Mr. Yelish of his plan to interrogate the defendant on February 16, 1983.

29. The defendant initiated no conversations with the police with respect to the Snohomish County incident.

B. Disputed facts.

1. Whether Mr. Kathan's words and actions induced the defendant to make incriminating statements.

2. Whether the defendant's statements to detective Fagan flowed from and were partly caused by the words and actions of Mr. Kathan.

3. Whether, after the phone call to Mr. Yelish, detective Fagan offered to return the defendant to his cell if he wished, to await the arrival of his attorney.

4. Whether the defendant stated that he would like to remain with Fagan in the office, waiting for his attorney's arrival.

5. Whether Fagan intended to establish repport with the defendant and get the defendant to make incriminating statements.

6. Whether detective Fagan continued to talk to the defendant after the phone call to Yelish's office.

7. Whether, under the circumstances, detective Fagan's words and actions were intended to, and did, elicit the incriminating statements made by the defendant.

8. Whether, under the circumstances, detective Fagan's words and actions amounted to interrogation of the defendant.

9. Whether the defendant waived his right to counsel.

10. Whether the defendant waived his right to remain silent.

11. Whether or not the statements of the defendant were freely and voluntarily made.

C. Court's conclusions as to the disputed facts.

1. The state, through the conduct of both Mr. Kathan and detective Fagan, went

to substantial lengths to insure that the defendant would not receive the benefit of and the effective assistance of counsel.

2. By their acts and conduct, Mr. Kathan and Mr. Fagan did not scrupulously honor the defendant's request for counsel.

3. Mr. Kathan's words and actions induced the defendant to make incriminating statements to him.

4. The defendant's statements to detective Fagan flowed from and were partly caused by the words and actions of Mr. Kathan.

5. The court is not persuaded that after the phone call to Mr. Yelish, detective Fagan did offer to return the defendant to his cell.

6. The court is not persuaded that the defendant did state that he would

like to remain with Fagan in the office, waiting for his attorney's arrival.

7. Detective Fagan intended to establish rapport with the defendant and get the defendant to make incriminating statements.

8. Detective Fagan continued to talk to the defendant after the phone call to Mr. Yelish's office.

9. Under the circumstances, detective Fagan's words and actions were intended to, and did, elicit the incriminating statements made by the defendant.

10. Detective Fagan's words and actions amounted to interrogation of the defendant.

11. In the totality of the circumstances of this case, the defendant did not waive his right to the assistance of counsel.

12. In the totality of the circumstances of this case, the defendant did not waive his right to remain silent.

13. In the totality of the circumstances in this case, the statements of the defendant to Mr. Kathan and detective Fagan were not freely and voluntarily made.

D. Conclusions of Law.

1. The defendant's statements were obtained in violation of his right to the assistance of counsel.

2. The defendant's statements were obtained in violations of his right to remain silent.

3. Since the defendant's statements were involuntary under all the facts and circumstances of this case, the statements are inadmissible in the prosecution's case-in-chief and inadmissible in rebuttal.

E. Order.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant's statements to Mr. Kathan and Mr. Fagan be, and the same hereby are, excluded from evidence in the above-entitled action.

DONE IN OPEN COURT this 20th day of July, 1983.

/s/
The Honorable Dennis J. Britt
Judge of the Superior Court

Presented by:

/s/
John R. Muenster
Attorney for Defendant

Copy received; notice of presentation waived; approved as to form:

/s/
Michael Magee
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,	)	No. 13714-0-I
v.	)	DIVISION ONE
DONALD R. HOOPER, Respondent.	)	FILED: JAN 11 1985

CORBETT, A.C.J. - The State appeals the order dismissing the information against the defendant, Donald R. Hooper. We reverse.

On November 11, 1982, the victim reported that she had been raped. She described the assailant and his automobile. On December 3, 1982, a detective hypnotized the victim to assist her in recalling the license number of the car. The hypnotic session was largely unproductive. The victim later identified the defendant in a lineup. Defendant was ultimately charged with first degree rape in Snohomish County. He moved to dismiss the charge because the victim had been

hypnotized. After a hearing on the motion, the trial court found that the hypnosis neither resulted in actual prejudice, nor made the victim's identification more or less reliable. However, the trial court relied upon State v. Long, 32 Wn. App. 732, 649 P.2d 845 (1982), and State v. Martin, 33 Wn. App. 486, 656 P.2d 526 (1982), rev'd, 101 Wn.2d 713, 684 P.2d 651 (1984), to conclude that the case must be dismissed because the witness was hypnotized without the safeguards proposed in those cases.

The trial court did not have the advantage of the Supreme Court decision in State v. Martin, 101 Wn.2d 713, 684 P.2d 651 (1984). Under Martin, testimony by a witness regarding a fact which became available following hypnosis is inadmissible. However, the testimony of a previously hypnotized witness is admissible if the State can show that the

testimony consists solely of pre-hypnotic memory, thus assuring that the purposes of Martin's procedural safeguards are satisfied. State v. Coe, 101 Wn.2d 772, 786, 684 P.2d 668 (1984). Defense counsel must have the opportunity to demonstrate to the jury that the witness has been subject to hypnosis. The State has the burden of establishing what the witness remembered prior to hypnosis. Any uncertainty should be resolved in the defendant's favor. Martin, at 722. The trial court erred by adopting a per se rule of dismissal because the witness had been hypnotized.

On remand, all post-hypnotic testimony should be rejected, and only the prior recall of the witness that has been properly preserved and documented should be allowed as evidence. The trial judge should determine whether there has been

substantial compliance with the Martin safeguards. State v. Laureano, 101 Wn.2d 745, 752, 682 P.2d 889 (1984).

The State also assigned error to suppression of a statement given by the defendant. The order of suppression was entered after a CrR 3.5 hearing. The State initially sought discretionary review of the suppression order. This was denied because the trial court had not determined that the practical effect of the order was to terminate the case. RAP 2.2(b)(2). Defendant now resists review of the suppression order on the ground that discretionary review was denied. He contends that the suppression order is not an appealable order.

The trial court's order of dismissal with prejudice was a final order. Therefore, the order suppressing evidence became reviewable as part of the final

judgment. RAP 2.4; see Hall v. Stolte, 24 Wn. App. 423, 425, 601 P.2d 967 (1979).

Defendant had been arrested in Kitsap County on unrelated charges before he became a suspect in this case. Soon after his arrest, he notified the police and prosecutor that he was exercising his right to remain silent and did not wish to be questioned unless his attorney was present. He later pleaded guilty to the Kitsap County charges. The court ordered a pre-sentence report and assigned the case for investigation to James Kathan of the Department of Probation and Parole.

Kathan met with the defendant at the jail on three occasions. During the first or second meeting, Kathan informed the defendant of the importance of his cooperation and honesty in preparing the pre-sentence investigation. He also informed the defendant that the sentencing

recommendation would be based on the investigation and that the sentencing judge would review the pre-sentence investigation and recommendation before imposing the sentence.

During the initial two interviews with Kathan, the defendant freely discussed the Kitsap County case. After the second interview with the defendant, Kathan was informed by the Kitsap County Prosecutor that the defendant was a suspect in a Snohomish County rape incident, the case here at issue. The prosecutor and Kathan both knew that the defendant was represented by an attorney, and the prosecutor was aware of the defendant's written notice that he did not wish to be interviewed without his attorney present.

During the third meeting, Kathan showed the defendant the Acknowledgment of Advice of Rights form which the defendant had signed. Defendant appeared to

understand the form. Kathan then told the defendant that he wanted to discuss the Snohomish County case with him. Kathan stated that he knew the defendant felt better after talking about the Kitsap County case and suggested that if the defendant felt he needed to talk about this case he could do so.

Defendant told Kathan that Snohomish County officials had attempted to discuss the case with him and he had refused. In addition, he said that he had been advised by his attorney not to discuss it. Kathan replied that the defendant should do what he though was right and that he should not feel compelled to talk about it. Despite his initial reluctance, the defendant decided that he wanted to talk to Kathan. Kathan did not notify the attorney that he planned to interrogate the defendant. Defendant then made admissions while Kathan listened and took

notes. During the interview, the defendant's attorney arrived and stated that his client would not comment further about the case. He asked Kathan to refrain from asking any more questions.

After the interview, Kathan went directly to the prosecutor's office to relate the defendant's admissions and the attorney's admonition. In addition, Kathan spoke with Kitsap County Police about the admissions. They notified Snohomish County authorities, and the defendant was ultimately charged with first degree rape.

At the CrR 3.5 hearing, the probation officer testified, but the defendant did not. The court found that (1) the State "went to substantial lengths to insure that the defendant would not receive the benefit of and the effective

assistance of counsel"; (2) by the conduct of Kathan, the State did not scrupulously honor the defendant's request for counsel; (3) Kathan's words and actions induced the defendant to make incriminating statements; (4) in the totality of the circumstances, the defendant did not waive his right to the assistance of counsel or his right to remain silent; and (5) the defendant's statements to Kathan were not freely and voluntarily made.

A knowing and intelligent waiver cannot be found once the Fifth Amendment right to counsel has been clearly invoked, as it was here, unless the defendant initiates the renewed contact. He did not do so. State v. Robtoy, 98 Wn.2d 30, 38, 653 P.2d 284 (1982). The court found that Kathan was an agent of the police when he sought to inquire about the Snohomish County incident. As such,

he was charged with the prosecutor's knowledge of the defendant's request for his attorney during questioning. The evidence supports the court's holding that the defendant's request for counsel was not scrupulously honored. The trial court did not err by granting the motion to suppress.

The voluntary nature of the admissions is a separate issue which will become important if on retrial the defendant testifies and denies the Snohomish County incident. Although not admissible in the State's case-in-chief because properly suppressed for violation of the right to counsel, the admissions could be used in rebuttal if voluntarily made. Harris v. New York, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1974); State v. Holland, 98 Wn.2d 507, 520, 656 P.2d 1056 (1983); State v. Davis, 82 Wn.2d 790, 793, 514 P.2d 149 (1973).

To be involuntary, a statement must be the result of threat, violence, promise, or the exertion of improper influence. State v. Setzer, 20 Wn. App. 46, 49, 579 P.2d 957 (1978). The test is whether the state's action was such as to overbear the defendant's will to resist and bring about a confession not freely self-determined. Rogers v. Richmond, 365 U.S. 534, 544, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961); State v. Gilcrist, 91 Wn.2d 603, 607-08, 590 P.2d 809 (1979).

Kathan's promise that the defendant would have peace of mind by making the full disclosure may have induced him to speak but did not overbear the defendant's will to freely determine what he said. The court's finding that the statement was not voluntary is not supported by other findings of fact or by Kathan's testimony. The court erred in determining that the statement was involuntary.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Corbett, J.

WE CONCUR:

/s/ Ringold, J. /s/ Durham, J.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 17764-8-I
v.	)	DIVISION ONE
DONALD R. HOOPER, Appellant.	)	FILED: MAR 28 1988

COLEMAN, A.C.J. -- This court stayed resolution of this case pending the decision in State v. Coe, 109 Wn.2d 832, [750] P.2d [208] (1988). Under Coe, post-hypnotic identification testimony is inadmissible, and therefore the parties agree appellant is entitled to a new trial. Coe, at 838.

Respondent has filed a cross-appeal asking this court to review the earlier decision in State v. Hooper, No. 13714-0-I (January 11, 1985), which sustained the trial court's suppression of appellant's admissions to parole officer Kathan. This court is authorized under RAP

2.5(c)(2) to modify a prior decision in the same cause when justice so requires. We find no reason to modify the earlier decision.

The decision was based on appellant's having earlier indicated he did not wish to discuss the Snohomish County incident unless his counsel was present. Nonetheless, Officer Kathan approached appellant, seeking to inquire about the Snohomish County matter.

> A knowing and intelligent waiver cannot be found once the Fifth Amendment right to counsel has been clearly invoked, as it was here, unless the defendant initiates the renewed contact. He did not do so. State v. Robtoy, 98 Wn.2d 30, 38, 653 P.2d 284 (1982).

Hooper, slip op. at 5. Despite developments in the case law subsequent to the Robtoy decision, it remains the law that

> an accused who asserts his right to counsel during custodial interrogation is not subject to further interrogation without counsel "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards

v. Arizona, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981).

State v. Johnson, 48 Wn. App. 681, 685, 739 P.2d 1209 (1987).

Consequently, this court will not now review the decision by a prior panel of this court to sustain the trial court's suppression of appellant's admissions. To do so would merely involve applying the same rule as did the earlier panel to the same set of facts.

The conviction is therefore reversed and remanded for a new trial.

/s/ Coleman, A.C.J.

WE CONCUR:

/s/ Scholfield, C.J. /s/Ringold, J.

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*The Honorable Solie M. Ringold is serving as a judge pro tempore of the Court of Appeals pursuant to Court of Appeals Rule 26.

SCHOLFIELD, C.J. (concurring) -- D.D. was hitchhiking on November 11, 1982, when a man she did not know offered

her a ride. After a few minutes, he turned off the main road, and D.D. asked to be let out of the car. She then saw he was pointing a gun at her. He stopped the car in a deserted area and told her to lie in the back seat. The man forced D.D. to take off her clothing, handcuffed her with plastic restraints and raped her, pointing a gun at her throughout. The man later cut off the restraints, told D.D. to get out of the car, threw her clothing out of the car, and drove away.

As the car drove away, D.D. notice that the numbers on the license plate were "220". She dressed and walked to a friend's house, where she called the police. An officer responded and took her back to the scene of the rape, where they found a blue comb which D.D. identified as hers, and a pair of the plastic restraints.

After the rape, D.D. had a clear picture in her mind of the person who had raped her. She assisted police in putting together a composite, and she described her assailant, the gun he used, the exterior and interior of the car, and a utility tray within the car.

On December 3, 1982, D.D. was hypnotized in order to enhance her memory of the license plate, the car, and the rapist. Investigating officers then heard that Kitsap County had a rape suspect in custody and that the person in custody had used plastic restraints. D.D. was taken to Kitsap County to view a lineup and a car and its contents. In Kitsap County, D.D. identified the defendant's car as the one she was raped in, identified the utility tray and her earrings that were in it and stated that the gun looked like the one carried by

her assailant. Later, D.D. viewed a lineup and identified the defendant in a lineup as the person who had raped her.

Prior to trial, the court determined "that the identification by the victim was, by clear and convincing evidence, based upon prehypnotic observations and not influenced by the fact that she was thereafter hypnotized." The court's conclusion was based on (1) the victim's belief, prior to hypnosis, that she could identify the rapist; (2) the long period of time the victim had to view the rapist; (3) the victim's prehypnosis descriptions, which were generally in accord with the defendant's appearance; (4) earrings, plastic restraints and license plate digits which were corroborating factors; and (5) the fact that the hypnosis was not intended to enable the witness to make an identification and was not suggestive.

It should also be noted that at the time D.D was hypnotized, the defendant was not a suspect, and it would have been impossible for the hypnotist to make any suggestions relative to the defendant.

After a trial before a jury, the defendant was convicted of rape in the first degree while armed with a deadly weapon.

The factual pattern in this case convinces me, as it did the trial court, that the victim's identification of the defendant's car in substantial detail, as well as her identification of the defendant as he assailant, was not aided in any way by hypnosis. Notwithstanding this factual setting, we are compelled to reverse the conviction in this case and remand for a retrial because of the decision of our Supreme Court in State v. Coe, 109 Wn.2d 832, [750] P.2d [208]

(1988). In that case, the court stated at page 838, [750 P.2d at 211] that State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984)

> rendered all posthypnotic testimony inadmissible, treating the hypnosis as a time barrier after which no admissible identifications could be made.

But for the decision in Coe, I would readily vote to affirm the conviction in this case on the ground that the hypnosis had no influence on the identification of the defendant or his automobile.

/s/ Scholfield, C.J.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 18219-6-I
v.	)	DIVISION ONE
TOBY V. JOHNSON, Appellant.	)	FILED: JUL 29 1987

48 Wn. App. 681, 739 P.2d 1209

PEKELIS, J. - Toby V. Johnson appeals his juvenile conviction for second degree burglary. He contends that the trial court erred in denying his motion to suppress his confession because (1) the police officer did not adequately advise him of his Miranda rights; (2) the police officer initiated interrogation after Johnson invoked his right to counsel; and (3) Johnson did not voluntarily waive his Miranda rights. We reverse and remand.

FACTS

Clement A. Gardner reported to the police that sometime between November 27 and 28, 1985, he discovered that two chain saws were missing from his garage. Detective Sigman of the Marysville Police Department was assigned to the case. He obtained a written statement from Toby Johnson, a juvenile, admitting that he took the saws. Johnson moved to suppress his statement based on Miranda violations.

Detective Sigman testified that in early January 1986, the Snohomish County Sheriff referred Johnson to him for questioning. Detective Sigman testified that he read Johnson his Miranda rights and that Johnson then requested an attorney. Detective Sigman terminated his interrogation and arranged for Johnson to speak

by telephone with public defender Al Lyon. After Johnson's conversation with Mr. Lyon, Detective Sigman testified that the following occurred:

> (Johnson) had talked with a public defender Al Lyon and at that time I advised (Johnson) that he didn't have to talk to me, and in fact had been advised by his attorney not to talk to me, but that if he did say anything, it could and would be used against him in a court - criminal prosecution - juvenile court or adult if the juvenile court declined jurisdiction. Toby at that time advised that he had been involved in the theft of some chainsaws (sic) in the area and gave me an accounting of the chainsaw (sic) thefts that he had been involved in.

Detective Sigman also testified that he wrote Johnson's confession at Johnson's request, that both of them edited the statement as they went along, and that Johnson then signed the statement. The Miranda form and Johnson's confession showed that 2 hours elapsed between the time Johnson received the Miranda warn-

ings and the time he finished his confession.

Johnson testified and denied that he had been given any Miranda warnings on this occasion. Johnson denied that the statement was accurate or that he had reviewed the statement prior to signing it because Detective Sigman told him "[t]he quicker you sign, the quicker you get out." He also recalled that prior to his confession, Detective Sigman promised him that he would not be prosecuted for any burglaries. In rebuttal, Detective Sigman agreed that he promised not to prosecute Johnson, but said that this promise extended only to City of Marysville cases. He added that he specifically advised Johnson that he had no control over the decision to prosecute Snohomish County charges. Detective

Sigman did admit that he was surprised when he was subpoenaed to testify and expressed some confusion that the crime charged was indeed a county charge.

The State's only other witness was Mr. Gardner who testified that someone broke into one of the buildings on his property and took two chain saws without his permission.

Johnson testified in his own behalf and essentially stated that he had purchased the chain saws for $10, unaware they were stolen. Johnson finally admitted that he suspected that they might have been stolen.

The trial court admitted Johnson's confession, finding first that Johnson was properly advised of his Miranda rights. the court also found that the evidence that Johnson was interrogated

for 2 hours did not by itself demonstrate "improper influence," and that Detective Sigman's efforts to hurry the process did not "amount to coercion". The court concluded that Johnson did not make his confession under duress and that Detective Sigman improperly. Johnson was found guilty of second degree burglary. He brings this appeal challenging the trial court's denial of his motion to suppress.

ANALYSIS

I. Did Detective Sigman properly advise Johnson of his Miranda rights?

Custodial interrogation must be preceded by advice to the accused that he has the right to remain silent, the right to counsel, and that anything he says can and will be used against him. State v.

Robtoy, 98 Wn.2d 30, 35, 653 P.2d 284 (1982) (citing Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966)).

This court must determine whether substantial evidence supports the trial court's conclusion that Detective Sigman properly advised Johnson of his Miranda rights. State v. Jones, 95 Wn.2d 616, 626-27, 628 P.2d 472 (1981). Here, Detective Sigman testified that he read Johnson his rights and that Johnson acknowledged his understanding by initialing each paragraph of the Miranda form. Johnson, on the other hand, denied that Detective Sigman advised him of his Miranda rights; however, the trial court in its oral ruling resolved this credibility issue against Johnson. Detective Sigman's testimony provides substantial

evidence to support the trial court's conclusion that Sigman properly advised Johnson of his Miranda rights.

II. Did Sigman initiate interrogation of Johnson after he invoked his right to counsel in violation of Miranda?

After a suspect has been advised of his Miranda rights,

> [i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have with him present during any subsequent questioning.

Miranda v. Arizona, 384 U.S. at 474; see also State v. Robtoy, 98 Wn.2d at 35 (if suspect requests attorney, interrogation must cease until attorney is present). Furthermore, an accused who asserts his right to counsel during custodial interrogation is not subject to further interrogation without counsel "unless the accused himself initiates further communi-

cation, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). Interrogation is

> either express questioning or its functional equivalent . . . [that is,] any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

(Footnotes omitted.) Rhode Island v. Innis, 446 U.S. 291, 300-01, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); see also State v. Pierce, 94 Wn.2d 345, 352, 618 P.2d 62 (1980) (adopting the definition of interrogation established in Rhode Island v. Innis).

The State poses the following scenario: After Detective Sigman read Johnson his Miranda rights, Johnson requested an attorney, Johnson spoke

with his attorney, Detective Sigman readvised Johnson of his Miranda rights, and then Johnson confessed. It is clear that the mere readvisement of his Miranda rights would not constitute "interrogation" because it was neither express questioning nor its functional equivalent. Rhode Island v. Innis, 446 U.S. at 300-01. It is unclear, however, what occurred between the time Detective Sigman readvised Johnson of his Miranda rights that the time Johnson confessed. The State concedes that at some point Detective Sigman promised not to prosecute Johnson if Johnson "talked" to Detective Sigman, but it fails to explain when Detective Sigman made this promise not to prosecute. Whether or not the detective's promise extended only to city charges, his promise constituted interro-

gation if it came after Johnson asked to speak to counsel. Sigman should have known that this type of promise was reasonably likely to elicit an incriminating response from Johnson.

The trial court did not attempt to resolve this question in its oral ruling, and did not enter written findings of fact and conclusions of law as required by CrR 3.5(c). In some instances, it is appropriate to remand the case to the trial court for entry of findings of fact and conclusions of law. See, e.g., State v. Gross, 28 Wn. App. 319, 323, 597 P.2d 894 (1979). In this case, however, a remand would be pointless. The trial court could not enter findings on the critical question presented, that is, whether Detective Sigman's promise preceded Johnson's request for counsel. The

record is simply incapable of yielding such a determination.[1]

In conclusion, the State admits it made a promise designed to obtain a confession, but fails to place the promise in the context of a 2-hour interrogation during which the defendant invoked his right to counsel. The State is therefore unable to meet its heavy burden of establishing that it refrained from interrogating Johnson after he invoked his right to counsel. See Robtoy, 98 Wn.2d at 37. We hold that Johnson's confession is inadmissible and remand for further proceedings consistent with this opinion.

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[1] The inference, if any, to be drawn from the scant record is that Detective Sigman made his promise to Johnson after Johnson invoked his right to counsel, not before. It is unlikely that after their deal was struck, Johnson asked to speak to counsel, and then confessed. This scenario is particularly unlikely when the evidence is undisputed that Johnson's attorney advised him to remain silent.

Reversed and remanded

RINGOLD, J., concurs.

SCHOLFIELD, C.J. (dissenting) - The majority opinion acknowledges that Johnson was properly advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), and that questioning of him by the detective ceased when he requested an attorney. It is undisputed that pursuant to his request, arrangements were made for Johnson to speak with an attorney - a public defender - on the telephone. It was after his conversation with the attorney that Johnson made incriminating statements which were admitted against him.

The majority holds Johnson's confession inadmissible because the record is unclear as to whether a promise of leniency was made before or after Johnson requested counsel. The majority reasons that the police are prohibited from making a promise of leniency after the defendant is provided the assistance of counsel because this would amount to interrogation.

I must respectfully dissent because of my view that Miranda v. Arizona, supra, does not prohibit custodial interrogation of a defendant after he has been fully advised of his constitutional rights and has been provided the assistance of counsel.

The United States Supreme Court has said more than once that custodial interrogation of the defendant must cease

until assistance of an attorney has been provided. If he requests counsel, "the interrogation must cease until an attorney is present." Miranda, at 474.

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981).

In Rhode Island v. Innis, 446 U.S. 291, 298, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980), the Court referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer." (Footnote omitted.)

The majority cites no cases from the United States Supreme Court of Washington

holding that a police officer cannot interrogate a defendant after he has been fully advised of his Miranda rights and has been provided with the assistance of counsel. Miranda refers to counsel being "present," but there is nothing in Miranda or in any Supreme Court cases following Miranda holding that being provided with the assistance of counsel over the telephone does not meet the requirement of the "presence" of counsel, in the context in which it is used in Miranda.

After counsel had been provided, the only issue is whether the confession was voluntary. While the trial court did not enter written findings of fact and conclusions of law as required by CrR 3.5, the trial judge did specifically discuss the subject of coercion in his decision and

specifically found on the record that no coercion or improper influence was asserted against Johnson prior to or during the confession, which was reduced to writing and signed by Johnson. Based upon this discussion by the trial judge in his decision, it is obvious that had a finding expressed in terms of voluntariness been entered, the court would have found the confession voluntary.

Under these circumstances, the confession should not be suppressed. It was given after proper advisement of rights pursuant to Miranda and assistance of counsel had been provided. The judgment should be affirmed.